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No. 06-119

In the Supreme Court of the United States

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY, PETITIONER

v.

FRIENDS OF THE EARTH, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, under Section 303(d) of the Clean Water Act, 33 U.S.C. 1313(d), the Environmental Protection Agency and the District of Columbia are required to express maximum pollutant loads for impaired water bodies on a daily basis.

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v.

FRIENDS OF THE EARTH, INC., ET AL.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 446 F.3d 140. The opinion of the district court (Pet. App. 1b-37b) is reported at 346 F. Supp. 2d 182.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1c-2c) was entered on April 25, 2006. The petition for a writ of certiorari was filed on July 21, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, "to restore and maintain the

chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 303 of the CWA requires each State (as well as the District of Columbia, 33 U.S.C. 1362(3)) to adopt water quality standards applicable to its waters. 33 U.S.C. 1313(a)-(c).

The CWA prohibits the unauthorized discharge of a pollutant from a point source into a water of the United States. 33 U.S.C. 1311(a), 1362(12).[1] A discharger may comply with the Act by obtaining and adhering to the terms of a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to 33 U.S.C. 1342. NPDES permits contain technology-based effluent limitations that reflect the pollution reduction achievable based on particular equipment or process changes, without reference to the effect on the receiving water. Where necessary, they also include more stringent effluent limitations (known as "water quality-based effluent limitations") necessary to ensure that the receiving waters achieve applicable water quality standards. See 33 U.S.C. 1311(b).

Congress also required States to establish "total maximum daily loads" (TMDLs) for "those waters within its boundaries for which the effluent limitations * * * are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. 1313(d)(1)(A) and (C). States must establish a priority ranking for such waters, and then, in accordance with that priority ranking, develop for each water body a

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[1] A "point source" is "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged." 33 U.S.C. 1362(14). "Nonpoint sources" are sources of pollution that are not "point sources," such as runoff from agricultural activities.

TMDL for each pollutant that the Environmental Protection Agency (EPA) has determined to be suitable for a TMDL. *Ibid.* EPA has determined that "[a]ll pollutants, under the proper technical conditions, are suitable for the calculation of total maximum daily loads." 43 Fed. Reg. 60,665 (1978) (emphasis omitted). States must submit their TMDLs to EPA for approval. 33 U.S.C. 1313(d)(2).

A TMDL "shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety." 33 U.S.C. 1313(d)(1)(C). The term "total maximum daily load" is not further defined in the CWA. EPA's regulations define a TMDL to be the sum of (1) the "wasteload allocations" allocated to point sources; (2) the "load allocations" attributed to nonpoint sources or natural background; and (3) a margin of safety. 40 C.F.R. 130.2(g)-(i).

TMDLs are not self-executing. Like water quality standards, wasteload allocations for point sources are implemented through NPDES permits issued pursuant to 33 U.S.C. 1342. See 40 C.F.R. 122.44(d)(1)(vii)(B).[2] Load allocations for nonpoint sources are implemented through voluntary or cooperative approaches, or by State or local law. See generally *Pronsolino* v. *Nastri*, 291 F.3d 1123, 1126-1127 (9th Cir. 2002), cert. denied, 539 U.S. 926 (2003).

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[2]Even in the absence of TMDLs, permits must include effluent limitations as stringent as necessary to meet water quality standards. 33 U.S.C. 1311(b)(1)(C). A TMDL is simply one tool for establishing such limitations.

2. The Anacostia River originates in Maryland and flows through the District of Columbia before joining the Potomac River. C.A. App. 665. Pursuant to 33 U.S.C. 1313(d)(1)(A), the District identified the portion of the river that flows through the District as not meeting its water quality standards for dissolved oxygen and turbidity (muddy or cloudy conditions). C.A. App. 390, 666, 724-725. The two TMDLs at issue here address those impairments.

The District's dissolved oxygen water quality standard seeks to protect water quality by requiring a minimum level of dissolved oxygen upon which aquatic organisms rely. Certain pollutants consume dissolved oxygen. One measure of the rate at which dissolved oxygen is consumed is a parameter called "biochemical oxygen demand" (BOD). The District established the BOD TMDL using a computer model that projected how a given percentage reduction in pollutant loads would affect dissolved oxygen levels. C.A. App. 146, 152-214, 269-272. The TMDL sets an annual average load reduction for BOD from storm water loads and combined sewer overflows (CSOs) based on the results of the modeling and the application of best professional judgment. *Id.* at 396-400, 402, 408-442, 678-679, 684-685. The District concluded, and EPA agreed, that expressing the BOD TMDL in terms of annual average loads of BOD was appropriate because the undesirable increases in BOD were attributable to the aggregate accumulation of oxygen-demanding materials over an annual cycle. *Id.* at 395-396, 398, 684.

The Anacostia River also fails to meet the District's water quality standard for turbidity. See C.A. App. 745. Excessive levels of total suspended solids (TSS) were identified as the main cause of these violations. *Id.* at

55. EPA developed a TMDL to protect fish, shellfish, and wildlife by setting TSS loads at a seasonal median average concentration of less than 15 mg/l for the period from April 1 through October 31, which assures water clarity sufficient for the growth of the aquatic vegetation necessary to sustain aquatic wildlife. *Id.* at 94, 107, 745-749, 803, 806. EPA also concluded that the required load was appropriately expressed as a seasonal load. While submerged aquatic vegetation provides essential food and habitat for aquatic organisms every day throughout the year, EPA concluded that TSS concentrations in the water column do not substantially impact the submerged aquatic vegetation community on a daily basis or outside the growing season of April 1 to October 31. *Id.* at 94, 113, 775, 803-806.

3. Respondent Friends of the Earth brought this action against EPA for judicial review of the TMDLs, and petitioner Water and Sewer Authority (WASA) intervened as a defendant. Respondent contended, *inter alia*, that TMDLs must be expressed as "daily" loads. C.A. App. 808-825.

The district court granted EPA's motion for summary judgment. Pet. App. 1b-37b. In light of the complexity of the statutory scheme and the function of TMDLs as an intermediate tool for achieving compliance with water quality standards, the court concluded that Congress had not expressed an unambiguous intent that every TMDL must be set on a daily basis, "when certain pollutants are more amenable to regulation through seasonal or annual calculations." *Id.* at 12b. Accordingly, the court determined that under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), it was required to defer to EPA's reasonable interpretation and application of the statute. Pet. App. 19b-22b. Here, the court found that

EPA had reasonably established annual and seasonal loads because of the specific nature of the pollution problems being addressed. *Ibid.*

4. The court of appeals reversed. Pet. App. 1a-13a. It concluded that the CWA unambiguously requires daily loads for all TMDLs. *Id.* at 5a-13a. The court therefore rejected EPA's reliance on its judgment that the limits for some pollutants, such as BOD and TSS, are more appropriately expressed with non-daily load allocations. *Id.* at 6a-8a. In doing so, the court declined to follow a decision of the Second Circuit holding that TMDLs may be expressed in terms other than daily load allocations. *Id.* at 9a (discussing *NRDC* v. *Muszynski*, 268 F.3d 91, 99 (2001)).

The court also rejected petitioner's argument that Congress's enactment of subsequent legislation addressing combined sewer overflows indicates that EPA has flexibility in interpreting the TMDL requirements. Pet. App. 9a-12a. The court held that the CSO policy endorsed by Congress requires full compliance with the other provisions of the CWA, and stated that petitioner could not rely on subsequent legislation to establish the intent of an earlier Congress. *Id.* at 11a. The court remanded for the district court to vacate EPA's approval of the TMDLs, but allowed the parties to seek a stay pending the establishment of new TMDLs. *Id.* at 12a-13a.[3]

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[3]The court also rejected EPA's claim that the case had become moot because the District had, while the case was on appeal, revised the water quality standards for dissolved oxygen and turbidity that apply to the Anacostia. Pet. App. 11a-12a. The court explained that because "[t]he TMDLs at issue here have never been

ARGUMENT

The court of appeals erred in holding that the CWA requires EPA to establish TMDLs as daily load allocations. Nevertheless, the court's decision does not warrant this Court's review. The judgment will have only limited effect because it is controlling law only in the District of Columbia. Moreover, EPA recently issued nationwide guidance for expressing TMDLs as daily loads. As a result, future controversies about the meaning of the CWA's provisions for TMDLs will likely arise in significantly different contexts.

1. Contrary to the holding of the court of appeals, the use of the word "daily" in the term "total maximum daily load" is not an unambiguous direction that TMDLs must be stated in the form of a uniformly applicable 24-hour load. "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

The CWA neither defines the term "total maximum daily load" nor specifies how a TMDL should be expressed. Instead, the Act explains that TMDLs are intended "to implement * * * water quality standard[s]," and therefore:

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repealed or superseded," they continue to be relevant to the NPDES permitting process. *Ibid.* On further reflection, the government agrees that the case is not moot.

> shall be established at a level *necessary to implement the applicable water quality standards with seasonal variations* and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

33 U.S.C. 1313(d)(1)(A) and (C) (emphasis added). Thus, the crucial hallmark and function of a TMDL is not that it is expressed in daily terms, but that it is set at a "level necessary to implement the applicable water quality standards with seasonal variations." 33 U.S.C. 1313(d)(1)(C).

Because the "necessary" level can vary, especially "with seasonal variations," 33 U.S.C. 1313(d)(1)(C), the term "daily" should not be read in isolation to require that every TMDL be established on an inflexible 24-hour basis. In some circumstances, TMDLs with non-daily allocations best reflect the levels necessary to meet a water quality standard for a particular pollutant in a particular water body (be it a river, stream, pond, lake, or reservoir). While many TMDLs can easily be expressed in terms of a 24-hour time period, such as those for some pollutants discharged from point sources in a predictable and continuous manner, other TMDLs may more appropriately use a non-daily load, such as an hourly, weekly, monthly, seasonal, or annual load.

In this case, for example, the pollutants of concern—BOD and TSS—primarily enter the Anacostia River during rainstorms. Thus, discharges of BOD and TSS will vary widely from one day to the next. In addition, BOD affects water quality indirectly by fueling a variety of biological and chemical reactions that reduce dissolved oxygen in the water. These reactions are de-

pendent on such factors as temperature, biological activity, sunlight, tides, and the volume and speed of flow of water in the river. C.A. App. 183-214. This variable reaction rate means that the BOD discharged today may not cause a problem today, but can accumulate and under certain conditions affect dissolved oxygen levels in the Anacostia River in the future. *Id.* at 221.

Similarly, TSS can have a negative physical effect by blocking sunlight from reaching submerged aquatic vegetation, which prevents or slows photosynthesis and thus affects the growth and survival of such vegetation. For this reason, TSS discharges are not significant if they occur on any given day, but rather when they reduce water clarity overall within the growing season to the extent that the reduced sunlight affects the growth and survival of submerged aquatic vegetation. C.A. App. 777.

The varied and complex circumstances of water pollution underscore that Congress's direction that TMDLs be "established at a level necessary to implement the applicable water quality standards with seasonal variations," 33 U.S.C. 1313(d)(1)(C), does not unambiguously impose a rigid one-size-fits-all requirement that every TMDL be expressed as a 24-hour load. The court of appeals' contrary reading "loses sight of the overall structure and purpose of the CWA." *NRDC* v. *Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). It is also contrary to longstanding EPA regulations and guidance entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See 40 C.F.R. 130.2(i) ("TMDLs can be expressed in terms of either mass per time, toxicity or other appropriate measure."); 50 Fed. Reg. 1776 (1985) ("TMDLs * * * may be expressed in terms of an appropriate averaging period, such as weekly or monthly,

as long as compliance with applicable [water quality standards] is assured.").

2. The Second Circuit correctly upheld non-daily TMDLs in *Muszynski*, 268 F.3d at 98-99. There, the court approved TMDLs that were expressed as seasonal and annual loads and declined to ascribe to Congress the irrational intent to impose a strict requirement of daily loads, "given that for some pollutants, effective regulation may best occur by some other periodic measure than a diurnal one." *Id.* at 99.

The conflict between *Muszynski* and the decision below does not, however, warrant this Court's review. The decision below is controlling law only in the District of Columbia. TMDLs are written by the States and approved by EPA Regional Administrators, or generated by EPA, and they are generally reviewed under the Administrative Procedure Act in federal district courts in the States where the impaired water bodies are located.

Moreover, EPA recently issued a guidance memorandum for the States and EPA Regions "recommend[ing] that all future TMDLs * * * be expressed in daily time increments," even in States within the Second Circuit. App., *infra*, 2a, 3a n.1. The guidance explains, however, that there is flexibility in how the daily loads may be expressed. *Id.* at 3a-5a. For example, in some circumstances TMDLs may be "expressed in terms of differing maximum daily values depending on the season of the year, stream flow (*e.g.*, wet v. dry weather conditions) or other factors." *Id.* at 4a.

As a result of EPA's new guidance, the current disagreement between the D.C. and Second Circuits will have only limited prospective effect, because new TMDLs will likely be drafted in a way that is consistent with the D.C. Circuit's decision but that also provides

the necessary flexibility. Because any future controversies concerning TMDLs will likely arise in the significantly different context of the approach outlined in EPA's new guidance, this Court's review is not warranted at this time.

3. Finally, there is no merit to petitioner's argument that requiring TMDLs to be expressed on a daily basis "directly conflicts" with Section 402(q) of the Act, which concerns combined sewer overflows. As EPA's new guidance explains, expressing *TMDLs* on a daily basis does not require that *permits* be expressed on that basis. See App., *infra*, 7a-11a.

Section 402(q) states that discharge permits, orders, and decrees "shall conform" to EPA's Combined Sewer Overflow Control Policy (CSO Control Policy), 59 Fed. Reg. 18,688 (1994). 33 U.S.C. 1342(q)(1). Petitioner correctly describes (Pet. 13-14) that policy as promoting a flexible, site-specific approach for achieving compliance with CWA requirements. See 59 Fed. Reg. at 18,688.

Consistent with the CSO Control Policy's call for a flexible, site-specific approach, and with the flexibility provided by the NPDES provisions, the permitting authority may establish water quality-based effluent limitations in an NPDES permit that are not expressed as daily limitations. The statute and regulations provide flexibility in the manner in which effluent limitations for non-continuous discharges such as CSOs are expressed. See 33 U.S.C. 1342; 40 C.F.R 122.45(e). While water quality-based effluent limitations must be consistent with the assumptions and requirements of available wasteload allocations in TMDLs approved by EPA (40 C.F.R. 130.7), those assumptions may include irregularity in the volume and frequency of storm water flows.

See App., *infra*, 5a-6a, 9a-10a. Thus, as EPA's new guidance explains, a TMDL expressed as a daily load can be implemented in an NPDES permit authorizing discharges of overflows from a combined sewer system consistent with EPA's CSO Control Policy and Section 402(q) of the CWA. See App., *infra*, 7a-10a; cf. Pet. App. 11a ("[T]he tension between the CSO Policy's flexibility and the perceived rigidity of daily loads exists only if daily loads must of necessity be set so low that any storm-event discharge would violate them—a premise unsupported anywhere in the record.").

Because expressing a TMDL as a daily load does not interfere with a permit writer's authority under the regulations to translate that daily load into the appropriate permit limitation, which in turn could be expressed as an hourly, weekly, monthly, or other measure as appropriate, petitioner's concern is misplaced. No court of appeals has rejected that approach to reconciling TMDLs expressed as daily loads with the CSO provisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2006

APPENDIX

November 15, 2006

MEMORANDUM

SUBJECT: Establishing TMDL "Daily" Loads in Light of the Decision by the U.S. Court of Appeals for the D.C. Circuit in *Friends of the Earth, Inc. v. EPA, et al.*, No.05-5015, (April 25, 2006) and Implications for NPDES Permits

FROM: Benjamin H. Grumbles,
Assistant Administrator

TO: Director, Office of Ecosystem Protection, Region 1
Director, Division of Environmental Planning and Protection, Region 2
Water Division Directors, Regions 3-7 and Region 9
Director, Office of Ecosystems Protection and Remediation, Region 8
Director, Office of Environmental Cleanup, Region 10

The purpose of this memorandum is to clarify EPA's expectations concerning the appropriate time increment used to express "total maximum daily loads" (TMDLs) in light of the recent decision by the U. S. Court of Appeals for the D.C. Circuit in *Friends of the Earth,*

Inc. v. EPA, et al., No. 05-5015 (D.C. Cir. 2006). In *Friends of the Earth*, the D.C. Circuit held that two TMDLs for the Anacostia River (one established by EPA and one approved by EPA) did not comply with the Clean Water Act because they were not expressed as "daily" loads.

The *Friends of the Earth* decision has raised some questions regarding the establishment of both TMDLs and effluent limits in National Pollutant Discharge Elimination System (NPDES) permits that implement wasteload allocations established in TMDLs. As explained in more detail below, EPA recommends that all future TMDLs and associated load allocations and wasteload allocations be expressed in terms of daily time increments. However, EPA does not believe that the *Friends of the Earth* decision requires any changes to EPA's existing policy and guidance describing how a TMDL's wasteload allocations are implemented in NPDES permits.

EPA's Expectations Regarding "Daily" Loads in TMDLs

EPA continues to believe that the use of the word "daily" in the term "total maximum daily load" is not an unambiguous direction from Congress that TMDLs must be stated in the form of a uniformly applicable 24-hour load. However at this time, there is significant legal uncertainty about whether courts across the country will follow the reasoning of the D.C. Circuit decision in *Friends of the Earth* or that of the U.S. Court of Appeals for the Second Circuit in their decision

in *NRDC v. Muszynski*[1]. In light of that uncertainty, EPA recommends that all TMDLs and associated load allocations and wasteload allocations be expressed in terms of daily time increments. In addition, TMDL submissions may include alternative, non-daily pollutant load expressions in order to facilitate implementation of the applicable water quality standards. TMDLs must continue to be established at a level necessary to attain and maintain the applicable water quality standards, account for seasonal variations and include a margin of safety. Because water quality standards are expressed in a variety of ways and because pollutants and water bodies have different characteristics, EPA believes that there is some flexibility in how the daily time increments may be expressed. The following are a few examples of this potential flexibility:

- If consistent with the applicable water quality standard and technically suitable for the pollutant and water body type in question, a TMDL and associated load allocations and wasteload

[1] In *NRDC v. Muszynski*, 268 F.3d 91 (2nd Cir. 2001), NRDC challenged EPA's approval of nutrient TMDLs with annual loads established by New York for reservoirs. The Second Circuit held that "the term 'total maximum daily load' is susceptible to a broader range of meanings" than loads calculated on a daily basis. 268 F.3d at 98-99. The D. C. Circuit decision in *Friends of the Earth* is controlling legal precedent for cases brought in the District of Columbia Circuit while the Second Circuit decision in *Muszynski* is controlling legal precedent in cases brought in the Second Circuit, which includes the States of New York, Connecticut, and Vermont. EPA encourages the three States within the Second Circuit, to submit TMDLs with "daily" loads in a manner consistent with this memorandum. EPA also recognizes that, while the Second Circuit did not vacate the TMDLs in question merely because they did not contain "daily" loads, it required a reasoned explanation for the choice of any particular "non-daily" load.

allocations may be expressed as both minimum and maximum daily loads, or as average daily loads. For example, a TMDL for the pollutant parameter pH may include both minimum and maximum values consistent with how the applicable WQS for the parameter pH is expressed (commonly as a range.)

- If technically appropriate and consistent with the applicable water quality standard, it may also be appropriate for the TMDL and associated load allocations and wasteload allocations to be expressed in terms of differing maximum daily values depending on the season of the year, stream flow (e.g., wet v. dry weather conditions) or other factors. In situations where pollutant loads, water body flows, or other environmental factors are highly dynamic, it may be appropriate for TMDLs and associated allocations to be expressed as functions of controlling factors such as water body flow. For example, a load-duration curve approach to expressing a TMDL and associated allocations might be appropriate, provided it clearly identifies the allowable daily pollutant load for any given day as a function of the flow occurring that day. Using the load-duration curve approach also has the advantage of addressing seasonal variations as required by the statute and the regulations.
- For TMDLs that are expressed as a concentration of a pollutant, a possible approach would be to use a table and/or graph to express the TMDL as daily loads for a range of possible daily stream flows. The in-stream water quality cri-

terion multiplied by daily stream flow and the appropriate conversion factor would translate the applicable criterion into a daily target (TMDL).

EPA will issue additional technical guidance providing specific information regarding the establishment of daily loads for specific pollutants that will take into consideration the averaging period of the pollutant, the type of water body, and the type of sources the TMDL needs to address.

Facilitating Implementation of Wasteload Allocations through the NPDES Permit Process

In certain circumstances (e.g., impairments caused by storm water), or where the applicable water quality criteria are expressed as a long-term average, it may be appropriate for TMDL documents or their supporting analysis to clearly set forth the implementation-related assumptions underlying any wasteload allocation expressed as a "daily" load. To facilitate implementation of such a load in water bodies where the applicable water quality standard is expressed in non-daily-terms, it may be appropriate for the TMDL documentation to include, in addition to wasteload allocations expressed in daily time increments, wasteload allocations expressed as weekly, monthly, seasonal, annual, or other appropriate time increments. When this approach is taken, the TMDL and its supporting documentation should clearly explain that the non-daily loads and allocations are implementation-related assumptions of the daily wasteload allocations and are included to facilitate implementation of the daily allocations as appropriate in NPDES permits and nonpoint source

directed management measures. The supporting documentation should discuss the reasons for, and assumptions behind, the non-daily loads to facilitate their understanding and use in the implementation phase.

Recommendations Concerning Existing TMDLs and TMDLs in Process

Through significant effort of the States and EPA regions, more than 20,000 TMDLs have been established, most of them in the last five or six years. EPA's database also shows that approximately 65,000 causes of impairment still need to be addressed by TMDLs. EPA believes that continued development of TMDLs pursuant to State TMDL development schedules is the highest priority at this time. If already existing TMDLs need to be revised in the future, revision of the TMDLs and allocations should be consistent with the recommendations in this memorandum.

For TMDLs under development that have not yet been adopted by States or established by EPA, EPA recommends that such TMDLs and allocations be revised, if feasible, to be consistent with this memorandum prior to their adoption or establishment. If States adopt and submit TMDLs expressed solely in non-daily terms, EPA expects to ask the submitting State to provide written documentation regarding how the submitted TMDLs and allocations would be expressed in daily terms. Such documentation provided by States could then be included in the administrative records supporting EPA's decisions on the TMDLs. If it is unable to obtain such documentation from a State, EPA may develop calculations for its administrative

approval record demonstrating how the State's TMDLs and allocations would be expressed in daily terms. In this case, EPA would make it clear that its approval of the State's TMDL is contingent on the assumption that such TMDL contains the daily load calculations developed by EPA.

We recommend that States consult with EPA regarding specific TMDL projects early in the development process to determine appropriate approaches to expressing the TMDLs and allocations. We are working to provide technical support as soon as practicable. First, we will be providing a draft of a technical document outlining an approach for deriving daily limits for bacteria, TSS, sediments and nutrients using the load duration curve approach. In addition, we are preparing a series of technical fact sheets and case studies based on typical averaging periods of criteria, types of water body and types of sources, to provide technical support in developing daily loads for all pollutants. These should be available for review and comment within the next few months.

Implications of the Friends of the Earth Decision for NPDES Permits

The *Friends of the Earth* decision does not affect an NPDES permitting authority's ability to use the discretion available to it under the CWA and the NPDES regulations in establishing permit effluent limits and conditions.

There is no express or implied statutory requirement that effluent limitations in NPDES permits necessarily

be expressed in daily terms. The CWA definition of "effluent limitation" is quite broad ("effluent limitation" is "any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources . . ."). See CWA 502(11). Unlike the CWA's definition of TMDL, the CWA definition of "effluent limitation" does not contain a "daily" temporal restriction. Indeed, the central statutory requirement for water-quality based effluent limits in NPDES permits is that they implement applicable water quality standards. See CWA 301(b)(1)(C). Such water quality standards will include water quality criteria for various pollutant parameters that are expressed in terms of differing temporal periods of duration, including hourly, daily, weekly, monthly, seasonal, and annual, as appropriate for each pollutant parameter.[2] Accordingly, effluent limits in NPDES permits may be written in a form that derives from, and complies with, applicable water quality standards that use any of these various time measures. See 122.44(d)(1)(vii)(A).

EPA's regulations at 40 CFR § 122.44(d)(1)(vii) require the permitting authority to ensure that: (a) the level of water quality to be achieved by limits on point

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[2] Section 2.1of EPA's *Technical Support Document for Water Quality-based Toxics Control* (TSD) dated March 1991, describes the basis for establishing water quality criteria. EPA's recommended water quality criteria consist of three components: (1) magnitude, (2) duration, and (3) frequency. Magnitude refers to the concentration of the pollutant. Duration is the period of time (averaging period) over which the in-water concentration is averaged for comparison with criteria concentrations. This specification limits the length of time that in-water concentrations may exceed the criteria concentrations. Frequency is how often the criteria can be exceeded.

sources is derived from, and complies with, all applicable water quality standards; and (b) effluent limitations developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, *are consistent with the assumptions and requirements of any available wasteload allocation* for the discharge prepared by the State and approved by EPA pursuant to 40 C.F.R. 130.7. This provision does not require that effluent limits in NPDES permits be expressed in a form that is identical to the form in which an available wasteload allocation for the discharge is expressed in a TMDL. 'Rather, permit limits need only be "consistent with the assumptions and requirements" of a TMDL's wasteload allocation.[3] To facilitate implementation of the TMDL, one of the stated "assumptions" of a TMDL's daily load or daily wasteload allocation might be that, for purposes of NPDES implementation in an appropriate context (e.g., storm water), the permit writer has the flexibility to express the permit's effluent limitation using a time frame in keeping with, and appropriate to, the water body and pollutant in question and the applicable water quality standard. Indeed, the TMDL submission might even include such alternate temporal expressions of the total load or the wasteload allocation as implementation assumptions.

The *Friends of the Earth* decision does not affect the NPDES permitting authority's ability to use all

[3] EPA's position on this issue was affirmed by the Environmental Appeals Board in *In re: City of Moscow, Idaho*, 10 E.A.D. 135, 148 (July 27, 2001) ("While the governing regulations require *consistency*, they do not require that the permit limitations that will finally be adopted in a final NPDES permit be *identical* to any of the WLAs that may be provided in a TMDL.")

available tools to translate TMDLs and their wasteload allocations into enforceable effluent limitations in discharge permits. For example, while the NPDES permitting regulations require "daily maximum" limits for continuous discharges from some point sources, the same regulations specifically authorize "average weekly" and "average monthly" limitations—rather than daily limitations—for discharges from publicly owned water treatment plants. See 40 C.F.R. 122.45(d). Moreover, the regulations further authorize the permit writer to use other unspecified units of time if it is impracticable to calculate daily, weekly or monthly limitations. *Id.* For non-continuous discharges, the regulations provide flexibility as to the manner in which such discharges are to be limited based on a consideration of factors, including frequency, total mass, maximum rate of discharge of pollutants and prohibition or limitation of specified pollutants by mass, concentration or other appropriate measure. See 40 C.F.R. 122.45(e).

NPDES permit regulations do not require that effluent limits in permits be expressed as maximum daily limits or even as numeric limitations in all circumstances, and such discretion exists regardless of the time increment chosen to express the TMDL. Therefore, expressing a TMDL as a daily load does not interfere with a permit writer's authority under the regulations to translate that daily load into the appropriate permit limitation, which in turn could be expressed as an hourly, weekly, monthly or other measure.

EPA will continue to use existing guidance and policy memoranda to guide the development of WQBELs that are consistent with both 40 CFR § 122.44(d)(1)(vii) and

40 CFR §122.45(d). These include: the *Technical Support Document for Water Quality-based Toxics Control* (TSD) dated March 1991, an EPA Memorandum titled *Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs* dated November 22, 2002, and a memorandum titled *Annual Permit Limits for Nitrogen and Phosphorus for Permits Designed to Protect Chesapeake Bay and its tidal tributaries from Excess Nutrient Loading under the National Pollutant Discharge Elimination System* dated March 3, 2004.

Recommendation Concerning NPDES Permits

EPA recommends that NPDES permitting authorities continue to establish effluent limits that implement wasteload allocations established in approved TMDLs in accordance with existing regulation, policy and guidance as described above.

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